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15
16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 LD, DB, BW, RH, and CJ on behalf of
19 themselves and all others similarly situated,

20 Plaintiffs,

21 vs.

22 UNITED BEHAVIORAL HEALTH, INC., a
23 California Corporation,
24 UNITEDHEALTHCARE INSURANCE
25 COMPANY, a Connecticut Corporation, and
26 MULTIPLAN, INC., a New York
27 Corporation,

28 Defendants.

Case No. 4:20-cv-02254-YGR
Related Case No. 4:20-cv-02249-YGR

**DEFENDANTS' NOTICE OF MOTION AND
MOTION TO EXCLUDE THE EXPERT
OPINION AND DECLARATION OF
PROFESSOR ALEXANDRA D. LAHAV**

Hon. Yvonne Gonzalez Rogers

Hearing: None set

1 **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on _____, at _____, or as soon thereafter as
 3 this matter may be heard, before the Honorable Yvonne Gonzalez Rogers in Courtroom 1 on the
 4 Fourth Floor of the Oakland Federal District Courthouse, located at 1301 Clay Street, Oakland,
 5 California 94612, Defendants United Behavioral Health and UnitedHealthcare Insurance Company
 6 (collectively, “United”) and MultiPlan, Inc. (“MultiPlan”) (United and MultiPlan are collectively
 7 referred to herein as “Defendants”), will and hereby do move this Court to exclude the expert
 8 opinion and declaration of Professor Alexandra Lahav offered on behalf of Plaintiffs LD, DB, BW,
 9 RH, and CJ (“Plaintiffs”) for purposes of the Motion for Class Certification.¹

10 Defendants make this Motion pursuant to Federal Rule of Evidence 702 and the standard
 11 articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This Motion is
 12 based on this Notice of Motion and Motion; the accompanying memorandum in support; the
 13 Declaration of Errol J. King; Defendants’ Opposition to Plaintiffs’ Motion for Class Certification;
 14 all evidence, records and pleadings in this action; oral argument that may be presented at the
 15 hearing of this Motion; and all other matters that the Court deems proper.

16 DATED: October 12, 2022

17 GIBSON, DUNN & CRUTCHER LLP

18 By: /s/ Geoffrey Sigler

19 Geoffrey Sigler

20 Attorney for Defendants UNITED BEHAVIORAL
 21 HEALTH and UNITED HEALTHCARE
 INSURANCE COMPANY

22 -AND-

23 PHELPS DUNBAR, LLP

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 27 ¹ Subject to this Court’s preferences and availability, Defendants submit that any hearing on this
 28 Administrative Motion be set for the same time as any hearing on Plaintiff’s Motion for Class
 Certification (Dkt. 170).

By: /s/ Errol J. King, Jr.
Errol J. King, Jr.

Attorney for Defendant MULTIPLAN, INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants United Behavioral Health and UnitedHealthcare Insurance Company
3 (collectively, “United”) and MultiPlan, Inc. (“MultiPlan”) (United and MultiPlan are collectively
4 referred to herein as “Defendants”), respectfully submit this Memorandum of Points and Authorities
5 in support of their Motion to Exclude the Expert Opinion and Declaration of Alexandra D. Lahav
6 which was filed by Plaintiffs LD, DB, BW, RH, and CJ (“Plaintiffs”), in support of their Motion for
7 Class Certification.

8 **BACKGROUND**

9 In support of their Motion for Class Certification, Plaintiffs submitted the declaration of
10 Alexandra D. Lahav, a law professor and expert on “class actions and aggregate litigation.” Pls.’
11 Ex. Z ¶ 1. Professor Lahav’s declaration purports to apply Rule 23 and related jurisprudence to the
12 facts of this case, ultimately concluding that certification of an ERISA and RICO class is
13 appropriate.² It is axiomatic that such testimony is improper because it invades the province of the
14 Court. Professor Lahav’s declaration should be excluded.

15 **LAW AND ANALYSIS**

16 The Court should exclude Professor Lahav’s declaration because it consists solely of
17 inadmissible legal opinions. While Rule 702 provides for the admission of expert testimony to assist
18 the trier of fact in understanding the evidence or to determine a fact in issue, “matters of law for the
19 court’s determination” are “inappropriate subjects for expert testimony.” *Aguilar v. Int’l*
20 *Longshoremen’s Union Loc. No. 10*, 966 F.2d 443, 447 (9th Cir. 1992). “The principle that legal
21 opinion evidence concerning the law is inadmissible is ‘so well-established that it is often deemed
22 a basic premise or assumption of evidence law -- a kind of axiomatic principle.’” *Pinal Creek Grp.*
23 *v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) (quoting *In re Initial Public*
24 *Offering Sec. Litigation*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001)). “Accordingly, federal courts

25
26 ² Notably, Professor Lahav considers herself an expert on class actions, not on healthcare law,
27 ERISA, RICO, or on how to administer or interpret healthcare benefit plans. Deposition of Professor
28 Alexandra Lahav (“Lahav Depo.”), taken in this case on September 23, 2022, at pp. 85-88, included
in Exhibit “1” to the Declaration of Errol J. King, which is attached hereto as Exhibit “A.”

1 typically prohibit lawyers, professors, and other experts from interpreting the law for the court or
 2 from advising the court about how the law should apply to the facts of a particular case.” *Id.*
 3 (collecting cases).

4 Though presented as an expert “declaration,” Professor Lahav’s declaration is in fact a
 5 second brief in support of class certification. *See Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d
 6 1146, 1158 n.13 (N.D. Cal. 1999) (characterizing a law professor’s declaration as a disguised *amicus*
 7 *curiae* brief). By her own admission, her “methodology” is “analysis and analogizing . . . to other
 8 class actions that have been certified.” Lahav Depo., at p. 133. This is no different than what
 9 attorneys are tasked with in their legal briefing to the Court. Her declaration is replete with legal
 10 arguments and conclusions, and admittedly serves to usurp the Court’s role in deciding Plaintiffs’
 11 Motion. *See* Pls.’ Ex. Z ¶ 1 (stating that she is providing an “expert opinion on whether a class
 12 should be certified in this case”); Lahav Depo., at p. 130 (“But I understand the question for me to
 13 answer is: Does the law support certifying a class under these circumstances, with this class
 14 definition? And that is what I explained.”). The declaration plainly constitutes an impermissible
 15 legal opinion and should be excluded from consideration.

16 In *Romero v. Allstate Ins. Co.*, 52 F. Supp. 3d 715, 723 (E.D. Pa. 2014), for example, the
 17 court struck a law professor’s declaration on class certification issues, noting that it was “nothing
 18 more than a legal opinion”:

19 Professor Redish’s Declaration can either be considered an additional brief in support
 20 of Allstate’s Opposition to the Motion for Class Certification—one not authorized
 21 by Court rules—or a proposed judicial opinion. While the Court acknowledges that
 22 Professor Redish likely possesses both a fine grasp of these legal issues and an
 23 awareness that Rule 23 concerns present several unique challenges to jurists, the
 24 Court is specifically charged with conducting its own individual analysis of the
 25 issues. Were his Declaration to be given weight as an “expert” opinion, the Court
 26 would essentially be abdicating its duties and permitting Professor Redish to usurp
 27 the Court’s role as the legal expert.

1 The same result should follow here. Professor Lahav’s declaration does not elucidate the facts;³ it
 2 endeavors to provide instruction on the applicable law and then reaches conclusions reserved for the
 3 Court. *See, e.g.,* Pls.’ Ex. Z ¶ 24 (“class certification is appropriate”); ¶ 30 (“This class definition
 4 describes a class that has Article III standing”); ¶ 40 (“the implicit requirements of Rule 23(a) . . .
 5 are met here”); ¶ 58 (“the requirements of Rule 23(b)(3) are easily met here”). Because this is wholly
 6 inappropriate, the Court should find that her declaration is inadmissible. *See Gable v. Nat’l Broad.*
 7 *Co.*, 727 F. Supp. 2d 815, 835 (C.D. Cal. 2010), *aff’d sub nom. Gable v. Nat’l Broad. Co.*, 438 F.
 8 App’x 587 (9th Cir. 2011) (excluding an expert report because it contained legal conclusions, as
 9 such opinions “invade the province of the judge”); *Pinal Creek*, 352 F. Supp. 2d at 1044 (excluding
 10 professor’s expert testimony and report where the “report offer[ed] nothing other than a discussion
 11 of the law and an application of the law”); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d
 12 1239, 1247 (N.D. Cal. 2000) (striking three declarations from law professors because they addressed
 13 questions of law).

14 CONCLUSION

15 Professor Lahav’s declaration should be stricken, as it impermissibly “invade[s] the province
 16 of the judge” and, as a practical matter, circumvents the Court’s page limitations on legal briefing.
 17 *Gable*, 727 F. Supp. 2d at 835. Her opinions are not the proper subject of expert testimony and
 18 should be excluded in their entirety.

26 ³ Nor could it, considering the minimal materials considered by Lahav in forming her opinion. *See*
 27 Pls.’ Ex. Z ¶ 8. She did not review the named Plaintiffs’ deposition testimony, the benefit plans,
 28 summary plan descriptions, or administrative service agreements. Lahav Depo., at pp. 120-21, 126-
 27, 147.

1 DATED: October 12, 2022

2 GIBSON, DUNN & CRUTCHER LLP

3
4 By: /s/ Geoffrey Sigler

Geoffrey Sigler

5 Attorney for Defendants UNITED BEHAVIORAL
6 HEALTH and UNITED HEALTHCARE
INSURANCE COMPANY

7 -AND-

8 PHELPS DUNBAR, LLP

9
10 By: /s/ Errol J. King, Jr.

Errol J. King, Jr.

11 Attorney for Defendant MULTIPLAN, INC.

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15 **ATTESTATION PURSUANT TO CIVIL LOCAL RULE 5-1**

16 Pursuant to Civil Local Rule 5-1(h)(3) of the Northern District of California, I attest that
17 concurrence in the filing of the document has been obtained from each of the other signatories
18 to this document.

19 DATED: October 12, 2022

GIBSON, DUNN & CRUTCHER LLP

20
21 By: /s/ Geoffrey Sigler

Geoffrey Sigler